IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

v.

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Respondents.

REPLY BRIEF

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REPLY BRIEF

In his Brief in Opposition, Respondent Abraham Benjamins (hereinafter referred to as "Respondent") states essentially two grounds why certiorari should be denied in this case. First, Respondent argues that the conflict between the decision of the Second Circuit below and the decisions of other United States Courts of Appeal will be removed because these other Courts of Appeal are likely to adopt the Second Circuit decision in *Benjamins*. Secondly, Respondent argues that the effect of this decision on federal question jurisdiction will be *de minimus*. On both grounds, Respondent is in error.

Respondent contends that, in time, the conflict between the Circuits (which Respondent concedes) is likely to be resolved by the Courts of Appeals themselves and that "the Supreme Court should refrain from premature intervention." Respondent believes that the other Circuits will inevitably follow the Second Circuit's decision. Respon-

dent asserts that the Second Circuit's opinion will be followed because "[i]n the field of Warsaw Convention interpretation, the Second Circuit has been a leader." However, as Judge Van Graafeiland, in dissent below, stated:

> Completely reversing our field, we now hold that Article 17 creates a cause of action for wrongful death. As justification for this turnabout, the majority relies in part upon the "paucity of analysis that accompanied the creation of the rule." I am at a disadvantage in challenging this statement, because Judge Lumbard, the writer of the majority opinion, also wrote *Noel.* However, I am satisfied that Judge Lumbard gave *Noel* the same careful and thoughtful consideration he gives to every case, and which he has given to this one. Moreover, I am convinced that the numerous courts who have adopted the reasoning of *Noel, see, e.g., Maugnie* v. *Compagnie Nationale Air France,* 549 F.2d 1256, 1258 (9th Cir.), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), did not do so without their own thoughtful analysis of its merit.

572 F.2d at 920; Appendix to the Petition at 18a.

The Second Circuit, by its decision below, has created a conflict where none existed before. It cannot be postulated that the other Courts of Appeal which have concluded that the Warsaw Convention does not create a cause of action will now immediately reverse themselves. These courts, having given independent consideration to the question are, in fact, not likely to change their views unless by a decision from the Court.

In addition to resolving the conceded conflict among the Circuits on a question of federal law, there are additional compelling reasons why the Court should resolve the conflict now. First, the decision below, if permitted to stand

as controlling precedent in the Second Circuit, creates many new issues which will take additional and perhaps unnecessary judicial effort to resolve. As Judge Van Graafeiland stated below:

> [F]ederal courts will be required to supply the elements missing in the Convention's "cause of action". Unless the federal courts develop a body of federal common law, they must look to other sources of law to determine whether a plaintiff was guilty of contributory negligence, Article 21, whether his damage was caused by the carrier's wilful misconduct, Article 25, whether he has a right of recovery for wrongful death, and the measure of his damages, Article 24(2). There can be no uniformity here.

572 F.2d at 922; Appendix to the Petition at 23a.

Secondly, the conflict among the Circuits evolves from an interpretation of a treaty of the United States. Treaty obligations of the United States should not be left in doubt, even for short periods of time. Thus, this Court should resolve the conflict now so that the interpretation of the treaty provisions involved here can remain settled and uniform.

Thirdly, this decision has a substantial potential effect on expanding federal jurisdiction at a time when Congress is attempting to limit it. Respondent, however, argues, at page 14 of his Brief, that

> Even if all Warsaw Convention cases were to become federal question cases, the number would be *de minimus.*

In support of this argument, Respondent cites statistics provided by the Administrative Office of the United States Courts which show that there were 605 diversity cases

characterized as *"Personal Injury—Airplane"*. He contends that these comprise the maximum number of all Warsaw cases which could still be brought per year, if diversity jurisdiction was eliminated and the decision below sustained.

Respondent's statistic, however, does not even approximate the total impact of the decision below upon the number of Warsaw cases which could be brought in federal courts. First, Respondent's statistic probably does not include those personal-injury cases governed by the Warsaw Convention which do not occur on an airplane. See, e.g.: *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) *cert. denied*, 425 U.S. 989 (1976) involving liability for a terrorist attack in an airport terminal; *Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir. 1976) involving a fall in a terminal.[1]

Secondly, the statistic does not take into account those cases which, prior to the decision below, could not have been brought in a federal forum, namely: (1) cases involving citizens of the same state and (2) suits between aliens. Thus, considering the effect of this decision only in terms of diversity jurisdiction, the number of Warsaw cases brought in the federal courts will increase significantly if the decision below is sustained.

In addition, however, if the jurisdictional amount requirement is eliminated in federal question cases as is presently under consideration by Congress, Warsaw cases which do not satisfy the jurisdictional amount could, for the first time, be brought in federal courts, if the decision below is sustained. It is clear that the Second Circuit below did not take into account the proposed legislation

[1] The study does not define the various categories. 40% of the personal injury cases compiled are listed as "Other".

abolishing the jurisdictional amount for federal question jurisdiction. Nor did the Court below and Respondent address the total impact on federal courts of expanding the jurisdiction over Warsaw cases that will result from the decision below.

This Court should grant the petition for a writ of certiorari because, as Respondent admits, conflict exists among the Circuits. This conflict should be resolved by the Court as soon as possible because the decision below deals with an important question of treaty interpretation which should be uniform for the United States. The decision should also be reviewed because it has the potential effect of increasing the number of Warsaw cases which may be brought in Federal Courts and raising new questions for judicial resolution which ultimately may be unnecessary to resolve, if the Second Circuit decision is reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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Certificate of Service

I, Nathaniel F. Knappen, being over the age of 18 years and an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have, this 27th day of September 1978, served three copies of the foregoing Reply Brief upon respondents by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

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/s/ NATHANIEL F. KNAPPEN

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Nathaniel F. Knappen

Sworn to before me
this 27th day of September, 1978

/s/ LAWRENCE MENTZ
Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County
Expires March 30, 1979